86-671

Supreme Court, U.S.
FILED
SEP 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ALICE G. UTSEY,

Appellant

v.

DEPARTMENT OF THE ARMY,

Appellee

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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20 pp

QUESTIONS PRESENTED

I.

Whether the time limits of 29 C.F.R. Sections 1613.233 and 1613.281(c), for filing an appeal to the EEOC or a civil action in district court, are jurisdictional prerequisites to suit in Federal Court.

II.

Whether the District Court is required to hold trial on the merits of a case once it is established in the pleadings that circumstances exist which may justify equitable tolling of the time limitations of 29 C.F.R. Section 1613.233 and Section 1613.281(c).

III.

Whether the EEOC's denial of appellant's untimely appeal is a final action for purposes of the time filing requirements of 29 C.F.R. Section

1613.233 and 1613.281(c).

IV.

Whether the doctrine of equitable tolling established by Zipes v. Trans World Airlines, 455 U.S. 385 (1982) applies in cases against the Federal Government arising under 92 U.S.C. Section 2000e-16, as equally as it applies to civilian employers in cases arising under 42 U.S.C. 2000e-2.

V.

Whether the doctrine of equitable tolling established by Zipes v. Trans World Airlines, 455 U.S. 385 (1982) applies to all the filing time requirements of Title VII of the Civil Rights Act of 1964, as amended by 42 U.S.C. Sections 2000e, et seq, or only to the filing time requirement for filing a charge of discrimination with the EEOC.

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JURISDICTION

This is an appeal of a memorandum decision of the United States Court of Appeals for the Fourth Circuit, Number 86-1018, dated and entered on June 30, 1986 (App. 1), which affirmed a judgment of the United States District Court for the Eastern District of Virginia granting the appellee's motion to dismiss appellant's civil action for lack of subject matter jurisdiction.

The notice of this appeal was filed in the United States Court of Appeals for the Fourth Circuit on the 29th day of September, 1986. (App. 3).

This appeal arises under the laws of the United States, specifically Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq., and 29 C.F.R. Section 1613.233 and Section 1613.281. The jurisdiction of

this Court is invoked under Title 28, U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. Section 2000e

29 C.F.R. Section 1613.233

29 C.F.R. Section 1613.281

See appendix for text of pertinent provisions.

STATEMENT OF CASE

Alice G. Utsey was a civilian employee of the Department of the Army who was dismissed from her job in February of 1983. Following her dismissal, she filed a claim of discrimination with the Department of the Army. Mrs. Utsey was afforded the rights and benefits of the Army's administrative EEOC processes. On February 8, 1985, Mrs. Utsey received notice of the Army's final decision

denying her claim. On March 11, 1985, Mrs. Utsey, acting pro se, filed an appeal of her claim with the EEOC. This appeal was filed beyond the time limits established by 29 C.F.R. Section 1613.233 and Section 1613.281. (App. 5, 7, 8).

On May 14, 1985, prior to a determination on her appeal by the EEOC, Mrs. Utsey, pro se, filed a civil action in the United States District Court for the Eastern District of Virginia, alleging jurisdiction under 42 U.S.C. Sections 2000e, et seq.. The EEOC made determination on Mrs. Utsey's appeal on July 10, 1985, denying the appeal because of her failure to file the same with the EEOC within the time limits prescribed by 29 C.F.R. Sections 1613.233 and 1613.281. Mrs. Utsey obtained counsel and was granted leave of the court to file a

late response to the Department of the Army's motion to dismiss. Mrs. Utsey was also given leave to file an amended complaint, doing so on August 12, 1986. (App. 4, 7, 8).

The District Court, granting the Army's motion to dismiss, ruled that the final administrative action in the case was the Army's denial of Mrs. Utsey's claim and not the EEOC's denial of her late appeal. The District Court then proceeded on the presumption that the time limits of 29 C.F.R. Sections 1613.233 and 1613.281 are jurisdictional prerequisites to action in Federal Court. Since Mrs. Utsey failed to comply with such limitations after receiving the Army's final determination, the Court dismissed her complaint for lack of subject matter jurisdiction. (App. 2).

On appeal to the Court of

Appeals for the Fourth Circuit, Mrs. Utsey, by counsel, argued that, regardless of the issue of what constitutes a final action for purpose of time filing limitations of 29 C.F.R. Sections 1613.233 and 1613.281, the District Court acted on the incorrect presumption that such time limitations are jurisdictional prerequisites. Counsel for Mrs. Utsey argued that such time limits are more in the nature of statutes of limitations and as such are subject to the doctrine of equitable tolling. Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982). Because of its incorrect presumption as to the nature of the time limits, the District Court failed to properly consider circumstances which would warrant application of the doctrine of equitable tolling, thereby preserving Mrs. Utsey's right to bring a civil action in the

district court. In addition, counsel for Mrs. Utsey appealed the district court's determination that the EEOC's denial of Mrs. Utsey's untimely appeal was not a final action for purposes of the 29 C.F.R. Sections 1613.233 and 1613.281 time limitations.

The Court of Appeals affirmed the decision of the District Court, holding that Mrs. Utsey's lawsuit was not timely. The memorandum of the decision did not address the issue as to whether the EEOC's denial of Mrs. Utsey's complaint was a "final action." The Court ruled further that despite uncertainties as to the applicability and scope of the equitable tolling doctrine, the circumstances and facts of this case did not warrant that such doctrine be applied. (App. 1).

REASONS FOR ALLOWANCE OF WRIT

The Federal Courts are in need of clarifying guidance as to the precise nature of the time filing requirements established in the Code of Federal Regulations pursuant to 42 U.S.C. 2000e-16.

In Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), the Court ruled that the filing time requirements for filing a charge of discrimination with the EEOC was more in the nature of a statute of limitation, therefore subject to equitable tolling. This decision overruled the long standing conclusions of lower federal courts that such filing time requirements were jurisdictional prerequisites for further review of a petitioner's claim.

However, since Zipes there has been no further amplification on the

scope of application of equitable tolling to other time filing requirements contained in the various provisions of Title VII of the Civil Rights Act of 1964, as codified by 42 U.S.C. Sections 2000e, et seq.

One specific area of uncertainty in the application of the Zipes doctrine is whether the time filing requirement for filing a civil action is also subject to equitable tolling. Such a possibility has been implied by the Supreme Court in Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984). However, due to the fact that this Court concluded that the equitable circumstances did not exist which would warrant tolling of the time limits for filing a civil action, this issue was not definitively addressed in that case.

The nature of what is equitable does not lend itself to a set formula

which would allow such determinations upon appeal without thorough exploration of the facts at trial. In Baldwin, the Court discussed a few situations where equitable tolling might be warranted. That discussion, we assert, was not intended to be an all-inclusive list of such situations. It is error for Federal Courts of Appeal to use the Baldwin opinion as a restrictive guideline in making determinations on matters which rightfully require a trial on the merits of the case in the district courts. Present interpretation of Baldwin is encouraging the circuit courts to make such limited factual determinations, as the Court of Appeals did in the present case.

The allowance of the writ of certiorari in this case will provide the opportunity for the Court to rule definitively whether the Zipes doctrine

of equitable tolling is to be applied to all time filing requirements of 42 U.S.C. Sections 2000, et seq., or only to the time limits for filing a charge of discrimination with the EEOC. Consideration of this case will also provide the Court the opportunity to further amplify the precedential limitations of Baldwin.

Another significant issue that shall be determined by this Court is whether the Zipes doctrine of equitable tolling is equally applicable in situations involving the Federal government as in circumstances involving a private sector defendant. The Zipes decision provides private sector employees with a considerable benefit to the provisions of 42 U.S.C. Sections 2000e, et seq. The purpose of 42 U.S.C. Section 2000e-16 is to provide employees of the Federal Government the

same benefits and protections of Title VIi of the Civil Rights Act as are enjoyed by their counterparts in the private sector.

There is a tendency among the Courts to require plaintiffs in cases against the Federal Government to overcome a presumption against equitably estopping the Federal Government from asserting its rights. Schweiker v. Hansen, 450 U.S. 785 (1981). A private sector defendant does not enjoy such a presumption, and a private sector plaintiff is not required to overcome such a presumption. The Zipes doctrine is by its nature a means by which the plaintiff can equitably estop the defendant from asserting legal protections from the running of the time filing limitation. The burden of overcoming the presumption established

by Schweiker is accomplished by the plaintiff's showing that the Federal Government acted with affirmative misconduct. This standard has been applied against federal employees in cases arising under 42 U.S.C. 2000e-16. Zografov v. V.A. Medical Center, 779 F.2d 967 (4th Cir. 1985). However, the application of such a standard in cases arising under 42 U.S.C. 2000e-16, while not applying the same standard in cases arising under 42 U.S.C. 2000e-2, appears to be totally inconsistent with the Congressional intent of providing Federal employees the same protection and benefits provided to civilian employees.

CONCLUSION

For the foregoing reasons, appellant Alice G. Utsey respectfully

requests that a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

ALICE G. UTSEY

By: _____
Of Counsel

CERTIFICATE OF MAILING

I hereby certify that 40 copies of the foregoing Petition for Writ of Certiorari and of the accampanying Appendix were deposited in a United States post office, with first-class postage pre-paid, and properly addressed to the Clerk of this Court, and that 3 copies each of this Petition were mailed to Justin W. Williams, Esquire, Counsel for Appellee, and to the the Solicitor General, properly addressed to their respective addresses this 29th day of September, 1986.

F. O. Blechman

STATE OF VIRGINIA

CITY OF NEWPORT NEWS, to wit:

I, the undersigned, a Notary Public, in and for the Commonwealth of Virginia at Large, do hereby certify that F. O. BLECHMAN, whose name is signed on the foregoing Certificate of Mailing, has acknowledged the same before me in the City and State aforesaid.

Given under my hand this 29th day of September, 1986.

Marguerite W Bridges
Notary Public

My commission expires: Nov 21, 1989